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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF ARIZONA**

**CWT Canada II Limited Partnership, an  
Ontario, Canada Limited Partnership; and  
Resource Recovery Corporation, a Delaware  
Corporation,**

**Plaintiffs,**

**v.**

**Kevin J. Bridges, an Arizona citizen; Jane  
Doe Bridges, an Arizona citizen; Richard  
Carrigan, a citizen of Nevada; Jane Doe  
Carrigan, a citizen of Nevada; and Danzik  
Applied Sciences, LLC, a Delaware Limited  
Liability Company,**

**Defendants.**

**And all related claims.**

**Case Nos.: 2:16-cv-00607-DGC  
2:16-cv-02577-GMS (Consolidated)  
2:17-cv-00969-JAT (Consolidated)**

**DEFENDANTS RICHARD  
CARRIGAN, ANTONY KER, AND  
DANZIK APPLIED SCIENCES,  
L.L.C.'S RESPONSE TO  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

**AND**

**DEFENDANTS RICHARD  
CARRIGAN, ANTONY KER, AND  
ELIZABETH DANZIK'S  
CROSS-MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

**(Oral Argument Requested)**

Defendants Antony Ker ("Ker"), Richard Carrigan ("Carrigan"), Danzik Applied Sciences, LLC ("DAS"), and Defendant/Counterclaimant Elizabeth J. Danzik ("Elizabeth") (collectively, "Defendants") hereby respond to Plaintiff CWT Canada II Limited Partnership and Resource Recovery Corporation's (collectively "CWT") Motion for Summary Judgment [Doc. 156], and submit their Cross-Motion for Partial Summary Judgment. The Response and Cross-Motion are supported by the following Memorandum of Points and Authorities, Defendants'

Controverting Statement of Facts (“CSOF”), Defendants’ Separate Statement of Facts (“SSOF”), and the Declarations of Ker, Carrigan, and David Timchak, Esquire, filed concurrently herewith.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **A. Response to CWT Parties’ Motion for Summary Judgment**

#### **I. Introduction**

CWT’s motion must be denied because material disputed fact issues exist regarding the alleged liability of Carrigan and Ker for the conversion-related claim, and because the doctrines of res judicata and collateral estoppel do not apply as argued by CWT, through the concept of “privity,” to establish such liability. Carrigan and Ker dispute CWT’s assertion of their degree of knowledge, participation, and responsibilities regarding RDX Technologies Corporation’s (“RDX”) treatment of the tax credit funds, the auditor’s reports, or the New York lawsuit. While Carrigan and Ker were parties to the original claims made by GEM in New York, they were never parties to the crossclaim and third-party claims by CWT after resolution of the GEM portion of that litigation. Moreover, Carrigan had severed his ties with RDX at or about the time that CWT’s cross-claims in the New York lawsuit were filed against Danzik and RDX, and therefore had no participation in or “control” over it, so as to be considered in privity with the other party defendants. Nor can Ker be considered in privity, as he undertook none of the actions with respect to the New York lawsuit which resulted in the entry of default judgment, which was the concealment and non-disclosure of documents by RDX’s then Chief Financial Officer and present CWT agent Candy Blazar (“Blazar”). As such, despite this claim failing as a matter of law, this Court cannot in any event grant judgment in CWT’s favor as, at a minimum, disputed material fact issues surround these claims.

It must be noted initially that CWT’s motion describes a claim of conversion against Carrigan and Ker. However, the operative pleading, the Second Amended Complaint [Docket 56], does not allege a count of conversion against them. Rather, that pleading, in its Sixth Cause

1 of Action, alleges as to Carrigan and Ker the claim of aiding and abetting conversion by others.  
2 As discussed below, the levels of proof of *scienter* differ significantly between claims of  
3 conversion, on the one hand, and aiding and abetting, on the other. While a conversion may be  
4 proven with a showing of an act of mere intentional appropriation or dominion over property,  
5 proof of aiding and abetting requires evidence of knowing wrongful participation in another's  
6 recognized tortious conduct. The record does not contain uncontroverted evidence that Carrigan  
7 or Ker were consciously aware of any of the tortious actions alleged against Danzik in the New  
8 York action (because they were not consciously aware, and nor was Danzik's conduct in fact  
9 tortious), and regarding which the default judgment was entered. Without undisputed evidence  
10 of Carrigan and Ker's knowing wrongful participation in what they then understood to be the  
11 tortious conduct of others, there can be no summary judgment on the only conversion-related  
12 claim against them, the aiding and abetting claim. Further, CWT should not be permitted in their  
13 reply to posit for the first time any new evidence or authorities purportedly supporting the aiding  
14 and abetting standard, which they have failed to argue and have therefore waived.

15 Ker was an officer and director of RDX. CWT has alleged that Ker is liable for aiding  
16 and abetting conversion by Danzik and DAS because the RDX board approved tax credit fund  
17 payments, received an auditor's report recommending closer scrutiny of RDX transactions with  
18 Danzik and DAS, and supposedly managed the New York litigation. However, as noted below,  
19 Ker approved transactions and audit reports primarily based on advice from and reliance on  
20 other officers at RDX, including Bridges and Blazar—RDX's then CFO. Ker was never  
21 informed, never believed, and never acted with the belief that his managerial actions in these  
22 regards were tortious or in furtherance of the tortious conduct of others. His mere involvement  
23 in these activities is insufficient to conclusively establish the mental state necessary to prevail on  
24 a motion for summary judgment on the aiding and abetting claim. Regarding the conduct of the  
25 New York lawsuit, while Ker was aware of the litigation, he did not manage the case for RDX.  
26 It cannot be seriously contended that the litigation was his primary or even significant duty, as

1 the bulk of the work on the case was handled by Blazar and RDX's local counsel. [Affidavit of  
2 Michael Finkelstein, Esq. (RDX's then counsel) filed in the New York action, attached to the  
3 affidavit of David Timchak, Esq as Exhibit L ("From the inception of my representation, Ms.  
4 Blazar was the individual directly involved and was the RDX Parties' lead contact for me").]  
5 Ker was not a party to CWT's cross-claims in the case, and certainly never "controlled" the  
6 case. The mere fact that Ker had some tangential knowledge or involvement in the defense of  
7 those claims does not establish the degree of involvement necessary for a conclusive finding that  
8 he was in "privity" with Danzik and RDX for purposes of binding him personally to the default  
9 judgment against those parties.

10 The evidence presented with respect to Carrigan is even less convincing, and is certainly  
11 not dispositive of CWT's claims regarding conversion. Carrigan was an outside director of  
12 RDX, who served from mid-2012 through the third quarter of 2014. His compensation was  
13 \$1,000.00 for the first few months of service, after which he went unpaid. As a member of the  
14 audit committee, his primary board function was to review and approve quarterly audit reports.  
15 He was never an officer or manager of RDX, and resided out of state. CWT's primary evidence  
16 against Carrigan regarding conversion is that, during certain of the tax funds transactions and  
17 when a report from RDX's auditors was received, he was a board member. Other witnesses –  
18 not Carrigan – have testified that, when some of the tax funds transactions occurred, Carrigan  
19 was a director and that, while he was a director, "the board" approved the transactions, and  
20 discussed auditing transactions with Danzik's company. Carrigan's testimony is that he recalls  
21 no such approvals or discussions, and did not attend all board meetings. Also, there is no  
22 evidence that Carrigan ever received a single penny of the tax funds. CWT has provided no  
23 "smoking gun" to contradict this, or to tie Carrigan to any specific decision, act, or omission.  
24 Rather, CWT's case against Carrigan rests primarily on his status as a director during that time,  
25 and the testimony of others regarding the board's actions and what Carrigan supposedly knew.  
26 Further, Carrigan was not connected with RDX when the New York case was prosecuted, was

1 not a party to it, and there is no evidence to establish that he ever participated in, let alone  
2 “controlled,” the case. Indeed, the relevant claims were not filed in New York until September  
3 22, 2014. Carrigan was no longer a director of RDX after the third quarter of 2014. There is no  
4 basis for a finding of privity with respect to Carrigan. Nonetheless, based on this non-existent or  
5 inconclusive evidence, CWT seeks to impose liability of \$8 million, plus punitive damages, on a  
6 former short-term director who earned a few thousand dollars in his limited role. Disputed fact  
7 issues preclude a summary judgment on the aiding and abetting conversion count with respect to  
8 Carrigan.

## 9 **II. Material Facts**

### 10 **Ker’s Role as an Officer and Director**

11 Between 2008 and 2013, Ker served as chief operating officer (“CEO”) of RDX. (SSOF.  
12 ¶ 1.) As CEO, his responsibilities included, but were not limited to, daily communications with  
13 the chief financial officer (“CFO”), maintenance of market relationships with investors, and  
14 other general corporate management functions. (*Id.* ¶ 2.) In March 2013, he was appointed  
15 chairman the board of directors of RDX, a position that he maintained until May 2014. (*Id.* ¶ 3.)  
16 As chairman of the board, Ker’s primary job responsibility included facilitating the relationship  
17 between RDX and CWT and CWT’s Jean Noelting. (*Id.* ¶ 4.) At no time was Ker responsible  
18 for overseeing the detailed day-to-day operations of RDX. (*Id.* ¶ 5.)

19 Ker was also tasked with reviewing and approving RDX invoices. (*Id.* ¶ 6.) Specifically,  
20 he would discuss invoices with RDX CFO, Kevin Bridges (“Bridges”), to determine whether  
21 expenses occurred or transactions were reported properly. (*Id.* ¶ 7.) At all times, Ker relied on  
22 Bridges to ensure payment was made on all invoices from different parties and vendors. (*Id.* ¶  
23 8.) Throughout Ker’s tenure as chairman of RDX, the board of directors regularly reviewed  
24 reports that were generated by RDX’s auditors. (*Id.* ¶ 9.) It was Ker’s understanding and belief  
25 that the auditor’s duty and ensuing reports were meant to, and generally did, identify  
26

1 transactions that merited closer review. (*Id.* ¶ 10.) But those reports never stated, or were  
2 understood by Ker to suggest, that something illegal or improper had occurred. (*Id.*)

3 On or about July 29, 2014, the board received an audit report regarding a transaction  
4 between RDX and DAS. The report specifically made general reference to “related party  
5 transactions.” (*Id.* ¶ 11.) Specifically, the report simply stated:

6 Related Party Transactions

7 We noted that the Company enters into various transactions with multiple related parties  
8 in the normal course of business for which there is very limited documentation of the  
9 business purpose retained. Under the terms of certain related party agreements, the board  
10 of directors may audit the source transactions; however, to date that right has not been  
11 exercised. Such transactions must be reviewed and approved by the Company's board of  
12 directors and adequate documentation retained in the Company's books and records. In  
13 addition, such transactions should be disclosed properly in the Company's consolidated  
14 financial statements. It is imperative that the board of directors increase their oversight  
15 over related party transactions.

16 (*Id.*) Notably, this does not specifically reference the RDX contract with DAS. (*Id.* ¶ 12.) After  
17 receiving this report, Ker spoke to Bridges to ensure that the transactions and monitoring were  
18 done appropriately under the agreement between RDX and DAS. (*Id.* ¶ 13.) The board did  
19 investigate, and neither the board nor the auditor found any improprieties regarding these  
20 transactions. (*Id.* ¶ 14.) Ker does not recall that the auditor ever filed an objection or did not  
21 sign off on the related financials. (*Id.* ¶ 15.) Ker was one of the only people in management that  
22 was actually familiar with the work DAS did for RDX for which DAS was paid. (*Id.* ¶ 16.) In  
23 that regard, Ker observed, as to DAS’ work, the manufacturing in the facilities, the installation  
24 on-site, and the quality of work and equipment on the sites where the related equipment was  
25 installed. (*Id.* ¶ 17.)

26 At no time was Ker responsible for making payments to DAS, and nor was he in a  
position to do so, because Blazar and Bridges were, at all relevant times, responsible for  
remitting payment using RDX funds. (*Id.* ¶ 18.) Specifically, Ker never directed the remittance  
of the tax credit monies to DAS, which was done by Bridges and Blazar. (*Id.* ¶ 19.) He did,  
however, approve various invoices and confirmed whether payments were made on the same.

1 (*Id.* ¶ 20.) It was also Ker's understanding and belief that the federal tax credit funds were not  
2 required to be in a segregated account, and those monies were deposited into RDX's operational  
3 account when they were received. (*Id.* ¶ 21.)

4 A majority of the work involving the New York litigation, including regarding litigation  
5 strategy and participation, was done by Danzik and Blazar, together with RDX's New York  
6 counsel. (*Id.* ¶ 22.) Ker was aware of the New York lawsuit, assisted in it when asked and to the  
7 degree that he was able to, but played no substantive role in it. (*Id.* ¶ 23.) Ker's only substantial  
8 participation in the New York case was to discuss with RDX's attorneys his recollection of  
9 events that occurred. (*Id.* ¶ 24.) Ker was never named as a party to any of CWT's claims and  
10 was dismissed as a party in the New York case entirely prior to those claims ever being filed.  
11 (*Id.* ¶ 25.)

#### 12 **Carrigan's Role as a Director**

13 Carrigan served as a director of RDX from mid-2012 through the first quarter of 2014.  
14 (*Id.* ¶ 38.) He was always an outside director, was never an officer or manager of RDX, and at  
15 all relevant times resided in another state. (*Id.* ¶ 39.) Carrigan's primary function as a director  
16 was as a member of the audit committee, and to review and approve quarterly audit reports. (*Id.*  
17 ¶ 40.) He does not recall that he attended all meetings of the board of directors, and has no  
18 specific recollection of personally approving payment of any of the tax credit funds to Danzik or  
19 any of Danzik's companies. (*Id.* ¶ 41.) Carrigan never received any payments from the tax credit  
20 funds. (*Id.* ¶ 42.) During his first few months of service as a director, Carrigan was paid  
21 \$1,000.00 per month, and nothing thereafter. (*Id.* ¶ 43.) When the audit report recommending  
22 closer scrutiny of transactions involving Danzik and any of his companies was provided to  
23 RDX, in late July of 2014, it was in the final quarter of Carrigan's service as a director, and  
24 Carrigan does not recall it. (*Id.* ¶ 44.) Carrigan denies that he discussed the auditor's warnings  
25 with Bridges. (*Id.*) Carrigan was not aware of, was dismissed early as a party to, and never  
26 participated in or controlled the New York lawsuit, as he left the company in the third quarter of



1 2014. (*Id.*) On August 28, 2014, the judge in the New York case dismissed the sole claim  
2 against Carrigan and Ker, which claim was made by a non-party to this litigation. (*Id.* ¶ 48.)

3 **The New York Lawsuit and Blazar's Actions**

4 In the New York lawsuit, the court entered a default judgment and struck the defendants'  
5 defenses based on the non-production of documents in discovery. (*Id.* ¶ 50.) It was learned  
6 thereafter that the documents in question had been hidden by RDX employee Blazar, who was  
7 then assisting CWT and who is now employed by an entity affiliated with CWT. (*Id.* ¶ 51.) On  
8 June 14, 2018, Danzik filed in the New York case a Memorandum of Law in Support of a  
9 Motion to Vacate the Judgment, based on actions of Blazar in hiding the necessary discovery  
10 documents and information from the cross-defendants so that they could not be produced in  
11 compliance with the court's orders. (*Id.* ¶ 52.) The motion includes the following facts, which  
12 are material to this Response, in contradicting any argument that any of Carrigan or Ker's acts  
13 or omissions caused the resulting default judgment.

14 Blazar volunteered to head the discovery process on behalf of Danzik and RDX. ("From  
15 June 2014, and to late summer 2015, I assisted RDX with sorting, copying, and labeling a  
16 substantial amount of court discovery evidence, that was gathered, and managed by Candie  
17 Blazar.... Candie Blazar was the lead person, and she directed everyone including me on how  
18 she wanted the data organized for the file boxes.") (*Id.* ¶ 53.) Ker has stated that the  
19 responsibility of sending the discovery to New York legal counsel was Blazar's, who at the time  
20 was the CFO for RDX and had direct access to all of the discovery documents. (*Id.* ¶ 54.) Blazar  
21 has admitted that she had access to all of the documents, servers, and ESI requested, and there is  
22 no evidence to dispute that she secreted away the necessary documents and computer  
23 equipment. (*Id.* ¶ 55.) RDX and Danzik's lack of access to these materials, and inability to  
24 produce them, was the cause of the default judgment. (*Id.* ¶ 56.)



**The UPA Did Not Require RDX to Hold the Tax Credit Funds**

The UPA, a copy of which is Exhibit 1 to CWT's Declaration of Kevin Bridges, Docket 158, references the tax credit funds in Section 2.3, at p. 10. That provision does not require the tax credit funds to be segregated into any particular or separate account, and, in fact, the funds never were so segregated. (*Id.* and SSOF ¶ 21.) Nor does the UPA contain any provision creating an express trust. (Exhibit 1 to CWT's Declaration of Kevin Bridges, Docket 158.)

**Certain Claims Against Elizabeth Danzik**

In this lawsuit, CWT brought claims against Elizabeth Danzik for fraudulent transfer, conducted discovery on those claims, and produced an expert report regarding asset-tracing relative thereto. (CWT's Second Amended Complaint and Complaint Against Elizabeth Danzik.) CWT's Complaint against Elizabeth Danzik also includes a count seeking an equitable accounting. (Complaint Against Elizabeth Danzik.)

**III. Argument**

**1. No Conversion Claim Alleged in the Second Amended Complaint**

The Second Amended Complaint does not allege a conversion claim against Ker or Carrigan. The only count related to conversion is the Sixth Cause of Action, for aiding and abetting conversion. On this basis alone, the motion should be denied, since it argues for liability for Carrigan and Ker's own conversion—a claim that was never pleaded and, in any event, would be contrary to fact. Also, CWT should be barred from raising new facts or arguments in its Reply regarding proof of the elements of aiding and abetting. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209, 214 n.3, 292 P.3d 195, 200 n.3 (Ct. App. 2012) (noting that “it [is] improper to introduce new evidence with [a] reply memorandum”).

An actionable conversion may occur notwithstanding a person's lack of tortious intent and even if an act is undertaken in good faith. *McGregor v. McGregor*, 48 N.Y.S.3d 877, 883-4, 55 Misc.3d 586, 592-3 (2017)(conversion is the unauthorized exercise of the right of ownership over property belonging to another to the exclusion of the owner's rights; a wrongful intention

1 to possess the property is not an essential element of conversion). And, “money” can be the  
2 subject of conversion when it can be described, identified, or segregated in the manner that a  
3 specific chattel can be and when it is subject to an obligation to be returned. (*Id.*) In contrast, the  
4 elements of aiding and abetting, including with respect to another’s conversion, are: (1) the  
5 existence of an underlying tort; (2) defendant’s knowledge of the underlying tort; and (3) that  
6 the defendant provided substantial assistance to advance the underlying tort’s commission. *Bigio*  
7 *v. Coca-Cola Co.*, 675 F.3d 163 (2d Cir., 2012). *See also, Dickinson v. Igoni*, 76 A.D.3d 943,  
8 908 N.Y.S.2d 85, 88 (2010)(“New York law permits a claim for aiding and abetting  
9 conversion.”); *Kirschner v. Bennett*, 648 F.Supp.2d 525, 533 (S.D.N.Y.2009)(requiring proof of  
10 “substantial assistance” in conversion context). As is clear, proof of aiding and abetting requires  
11 that the defendant be presently aware that another person is committing a tort, and the defendant  
12 then knowingly assists that tortfeasor, including, in the conversion context, by providing  
13 “substantial assistance.”

14 CWT’s motion against Carrigan and Ker presumes the lower conversion standard, which  
15 is practically a strict liability standard, *i.e.*, if a person’s “intentional” act serves in any way to  
16 facilitate another person’s act of dominion over property, then that person is also liable for  
17 conversion, regardless of that person’s *scienter*, including an act undertaken in good faith. Here,  
18 CWT argues that Carrigan and Ker approved the movement of the disputed tax credit funds and  
19 did not undertake a deeper audit of RDX’s transactions with Danzik, and are therefore  
20 themselves liable for conversion. However, whatever inferences could possibly be drawn from  
21 CWT’s supporting evidence, they are not conclusive inferences, and have been contested by  
22 Carrigan and Ker insofar as concerns their awareness, mental state, and intentions. Under the  
23 standards of proof of aiding and abetting, and for purposes of CWT’s motion, there must be un-  
24 contradicted evidence that, at the time of these alleged acts or omissions, Carrigan and Ker were  
25 aware that a tort was being committed, and took affirmative and tortious steps to advance and  
26

1 facilitate the other actor's tort. The record simply does not support such conclusive inferences,  
2 as there exist material disputed fact issues surrounding all of the pertinent allegations.

3 Ker was never advised that the transactions between RDX and DAS on that contract were  
4 improper or tortious. The UPA does not establish an express trust or escrow for the tax credit  
5 funds, and it includes an off-set provision. Ker had knowledge of DAS deliverables under the  
6 contract, and therefore was justified in his belief that the contract was completely valid. Bridges  
7 and Blazar were responsible for payments on the contract, and, until the fall of 2015, never  
8 advised Ker of any improper or tortious aspect of the contract or those payments at any relevant  
9 time. Regarding both the movement of tax credit funds and the auditor's report, Ker never had  
10 information or himself acted with any tortious intent. As noted above, Ker was not a party to the  
11 New York lawsuit cross-claims, and did not in any respect direct or control the company's  
12 defense of that case, even if he did participate in it to a small degree. Ker was certainly not  
13 responsible for the events leading to the default judgment. The aiding and abetting of conversion  
14 claim requires, for purposes of CWT's motion, conclusive and undisputed evidence of Ker's  
15 tortious intent and awareness, in relation to what he then understood to be the tortious conduct  
16 of DAS and Danzik in regards to the consulting contract. No such conclusive evidence has been  
17 provided, and CWT's evidence has, in fact, been contested.

18 Carrigan's involvement was even more attenuated, and he was never aware of any  
19 tortious action of others with respect to the tax credit funds, and denies that he ever intended to  
20 act tortiously himself, and therefore he could not possibly be found conclusively to have aided  
21 and abetted torts committed by Danzik or DAS, for purposes of a motion for summary  
22 judgment. Carrigan is entitled to have a jury consider the evidence and make its determinations  
23 on the disputed facts, including on issues of credibility. CWT's case against Carrigan is,  
24 essentially, that his status was that of a director at the time that some of the tax credit funds were  
25 paid out, and when auditors recommended an audit of RDX's transactions with Danzik and  
26 DAS. Carrigan has testified that he was never aware of any decisions to pay out the tax credit

1 funds, and does not recall the auditors' recommendations. CWT has no evidence that he  
2 attended any critical board meetings when the board expressly considered and/or acted on such  
3 matters. CWT's sole evidence is that other witnesses have confirmed that payments were made  
4 and approved by "the board," auditors' reports were presented to "the board," and that, at those  
5 times, Carrigan was serving as a director. But CWT has no "smoking gun" conclusively  
6 establishing Carrigan's actions, or his knowledge of the tortious conduct of others in relation to  
7 his own actions. Further, as noted above, Carrigan was separated from RDX soon after the  
8 auditors' report recommending closer scrutiny, and soon after the New York lawsuit was  
9 brought. Carrigan never participated in, much less controlled, the conduct of the lawsuit. There  
10 is no evidence whatsoever that Carrigan was involved in or even aware of any of the events  
11 leading to the default judgment. He never personally received any of the subject funds, and was  
12 only compensated a few thousand dollars for his entire service as a director.

13 Finally, as noted, even though the Second Amended Complaint does not allege a claim  
14 against Carrigan and Ker for conversion *per se*, they contest any allegation or suggestion that the  
15 subject tax credit funds were required to be kept in a segregated account, or ever were so  
16 segregated, which is a requirement of a conversion claim for money. Because the only provision  
17 of the UPA regarding the tax credits, Section 2.3, contained no segregation term, and because  
18 the subject funds were not so segregated, there are no "identified funds" to support a conversion  
19 claim for money. *Grgurev v. Licul*, 229 F.Supp.3d 267, 285-7 (2017)(if the allegedly converted  
20 money is incapable of being described or identified in the same manner as a specific chattel, it is  
21 not the proper subject of a conversion action), and quoting *Fiorenti v. Cent. Emergency*  
22 *Physicians*, 305 A.D.2d 453, 762 N.Y.S.2d 402, 403 (2003) and *Horn v. Toback*, 44 Misc.3d 42,  
23 989 N.Y.S.2d 779, 782 (App. Term 2014)(holding that defendant was entitled to summary  
24 judgment on conversion claim because the claim "seeks merely to recover an allegedly unpaid  
25 debt, and does not seek to recover money from a discrete, identifiable fund"), and that  
26 determination often turns on whether the money alleged to have been converted was contained

1 in a segregated fund of some sort. *See, e.g., Mfrs. Hanover Tr. Co. v. Chem. Bank*, 160 A.D.2d  
 2 113, 559 N.Y.S.2d 704, 712 (1990) (“Money, specifically identifiable and segregated, can be the  
 3 subject of a conversion action.”)). *See also, Global View Ltd. Venture Capital v. Great Central*  
 4 *Basin*, 288 F.Supp.2d 473, 480 (S.D.N.Y. 2003)(the conversion claim failed because the  
 5 plaintiff did not specifically identify the allegedly converted funds; to state a cause of action for  
 6 conversion of money, the money must be “described or identified in the same manner as a  
 7 specific chattel.” *9310 Third Ave. Assocs., Inc. v. Schaffer Food*, 210 A.D.2d 207, 620 N.Y.S.2d  
 8 255, 256 (App.Div. 2d Dep’t 1994). In other words, the money must be “specifically identified  
 9 and segregated.” *Manufacturers Hanover Trust*, 559 N.Y.S.2d at 712. and *McBride v. KPMG*  
 10 *Intern.*, 135 A.D.3d 576, 580, 24 N.Y.S.3d 257, 262 (2016)(investor plaintiffs failed to establish  
 11 a claim for conversion, because, even if the subject money was specifically identifiable when  
 12 sent to defendant, there was no indication that defendant segregated it when it sent the investors’  
 13 money to a third-party). CWT was, therefore, a mere unsecured creditor in relation to the  
 14 subject funds, not a party that could have standing to bring a conversion-related claim with  
 15 respect to the funds.

## 16 **2. Economic Loss Rule Bars the Conversion Claim**

17 The conversion-related claim against Carrigan and Ker (for aiding and abetting) is a tort  
 18 claim arising out of contract (the UPA), where no personal injury or property damage has been  
 19 alleged. The economic loss rule (“ELR”) precludes such a claim. *See Flagstaff Affordable*  
 20 *Hous. Ltd. P’ship v. Design All., Inc.*, 223 Ariz. 320, 327, 223 P.3d 664, 671 (2010) (“The  
 21 principal function of the economic loss doctrine, in our view, is to encourage private ordering of  
 22 economic relationships and to uphold the expectations of the parties by limiting a plaintiff to  
 23 contractual remedies for loss of the benefit of the bargain.”); *see also, Cook v. Orkin*  
 24 *Exterminating Co.*, 227 Ariz. 331, 333, 258 P.3d 149, 151 (App. 2011)(dismissing tort claims  
 25 due to economic loss rule). In *Cook*, the Cooks similarly filed an “action against Orkin alleging  
 26 claims for breach of contract, breach of the implied covenant of good faith and fair dealing,

1 breach of warranty, breach of fiduciary duty, negligence, negligent and intentional  
2 misrepresentation, and fraud.” (*Id.*) Thereafter, Orkin moved for summary judgment on the  
3 grounds that the Cooks’ tort claims were barred by the ELR, that Orkin owed no fiduciary duty  
4 to the Cooks, and that Orkin had not breached the Agreement.” (*Id.*) Ultimately, the court ruled  
5 that the Cooks had failed to establish facts giving rise to a claim for breach of fiduciary duty and  
6 that their tort claims were barred by the ELR. (*Id.*) The Court of Appeals affirmed and  
7 explained:

8 We consider the relevant contract and tort law policies and determine the ELR  
9 applies in this case and limits the Cooks’ claims to those in contract. As in  
10 Flagstaff II, the contract law policy of upholding the parties’ expectations favor  
11 limiting the Cooks’ claims to those in contract and, where there has been no injury  
12 besides that to the subject property, there is no strong policy reason to impose tort  
13 liability. Accordingly, we apply the ELR and hold that the Cooks are limited to  
14 their contractual remedies for purely economic loss from Orkin’s alleged failure to  
15 adequately perform its promises under the Agreement. Because the Cooks are  
16 seeking remedies for purely economic loss from Orkin’s alleged failure to  
17 adequately perform its promises under the Agreement, the ELR bars their tort  
18 claims.

19 *Id.* at 335, 258 P.3d at 153. Because CWT alleges only economic damages arising out of its  
20 contractual relationship with Danzik and RDX, the tort claim regarding the alleged aiding and  
21 abetting of conversion is barred by the ELR.

22 Moreover, CWT cannot circumvent the ELR by suing corporate representatives  
23 individually. *See Gilbert Unified Sch. Dist. No. 41 v. CrossPointe, LLC*, No. CV 11-00510-  
24 PHX-NVW, 2012 WL 1564660, at \*6 (D. Ariz. May 2, 2012) (“Therefore, the economic loss  
25 doctrine bars the District’s fraudulent inducement claim against Keebler because the allegedly  
26 false representations are inseparable from the essence of the contractual agreement between the  
District and CrossPointe, Keebler made them as CrossPointe’s chief executive officer on behalf  
of CrossPointe, and the doctrine would bar a fraudulent inducement claim against CrossPointe  
on the alleged facts. The District may not circumvent the economic loss doctrine, which bars tort

1 recovery from CrossPointe, by asserting tort claims against its chief executive officer, who acted  
2 on behalf of CrossPointe and whose allegedly false statements were adopted by CrossPointe.”)

3 A basic axiom of corporate law is that a corporation will be treated as a separate entity  
4 unless there is sufficient reason to disregard the corporate form. As a separate entity, the  
5 personal assets of a corporate officer or director may not normally be reached to satisfy  
6 corporate liabilities. A corporate entity will be disregarded, and the corporate veil pierced, only  
7 if there is sufficient evidence that: 1) the corporation is the alter ego or business conduit of a  
8 person, and 2) disregarding the corporation's separate legal status is necessary to prevent  
9 injustice or fraud. *Loiselle v. Cosas Mgmt. Grp.*, LLC, 224 Ariz. 207, 214, 228 P.3d 943, 950  
10 (App. 2010). Because CWT fails to allege that Carrigan or Ker are the alter ego of RDX, the  
11 claim regarding conversion against them is prohibited.

12 It is the case that, under Arizona law, an officer or director can be liable if they  
13 knowingly and intentionally cause or acquiesce in the commission of a tort. See *Dawson v.*  
14 *Withycombe*, 216 Ariz. 84, 101, 163 P.3d 1034, 1051 (Ariz.App. 2007)(citing *Bischofshausen,*  
15 *Vasbinder, and Luckie v. D.W. Jaquays Mining and Equip. Contractors Co.*, 145 Ariz. 204,  
16 210–11, 700 P.2d 902, 908–09 (App.1985) (corporate directors can be personally liable for torts  
17 committed by a corporation or an officer by virtue of their office if they “have knowledge  
18 amounting to acquiescence....”; to be held liable a corporate director must specifically direct,  
19 actively participate in, or knowingly acquiesce in the fraud or other wrongdoing)). However, for  
20 purposes of summary judgment, and owing to the evidence of disputed fact issues regarding  
21 Carrigan and Ker’s lack of knowing and/or intentional wrongful participation in the known  
22 wrongful actions of others, any evidence of aiding and abetting conversion put forward by CWT  
23 would not conclusively establish the applicability of this exception to the ELR.

24 Because CWT’s tort claim regarding conversion against Carrigan and Ker is barred by  
25 the ELR, CWT’s motion should be denied and dismissed as a matter of law.



1           **3.     Ker and Carrigan Cannot Be Found to Have Been in Privity re NY Action**

2           Neither Carrigan nor Ker “controlled” the New York litigation, including Blazar’s  
3 actions with respect to the concealed documents. Neither of them was actively or negligently  
4 responsible for the movement of the tax credit funds or the outcome of the New York litigation.  
5 As a director, Ker approved the payments involving the tax credit funds based on the advice of  
6 Bridges and Blazar, neither of whom ever advised him that there was any impropriety in doing  
7 so. Ker was aware of DAS’ performance and deliverables under the subject contract. Ker was  
8 aware of the auditor’s advice regarding scrutiny of related-party transactions, and consulted with  
9 Bridges on the subject, and was never warned or advised that there was any impropriety. The  
10 audit report itself does not identify an alarming, much less illegal, situation regarding the  
11 transaction. Carrigan has testified that, while a director, he has no specific recollection of  
12 approving particular transactions involving DAS and Danzik, or of the audit report. That audit  
13 report and the cross-claims in the New York case coincide with the quarter in which Carrigan  
14 left the company as a director. There is no conclusive evidence connecting any act by Carrigan  
15 to any of these events. Therefore, there can be no conclusive finding, as to Ker or Carrigan, of  
16 privity with Danzik and/or DAS such that principles of res judicata and/or collateral estoppel bar  
17 them from contesting the aiding and abetting claim, or in asserting their defenses to the claim,  
18 including the defense of CWT’s fraud in the underlying sale of the industrial facility.

19           **IV.   Conclusion**

20           For the foregoing reasons, the Court should deny and dismiss CWT’s motion regarding  
21 the conversion claim. Material disputed fact issues exist that preclude a ruling in CWT’s favor.  
22 Because the claims arise out of the UPA, these Defendants request an award of their reasonable  
23 attorneys’ fees and costs incurred in defending these counts, pursuant to A.R.S. §§ 12-341 and  
24 12-341.01, any applicable provisions of the contracts, and/or otherwise at law.

1 **B. Defendants' Cross-Motion for Partial Summary Judgment**

2 **I. Introduction**

3 Carrigan and Ker cross-move for summary judgment on the following of CWT's claims  
4 against them in CWT's Second Amended Complaint:

5 **1. Tortious Interference: Third Cause of Action**

6 As a matter of law, a cause of action for tortious interference with contract cannot lie  
7 against a party to that contract, and, as here, in the case of a contracting corporate party, cannot  
8 be brought against officers or directors of that same entity. Carrigan and Ker were directors  
9 and/or officers of RDX, the contracting party, and the tortious interference count against them  
10 therefore fails to state a claim for which relief may be granted.

11 **2. Breach of Trust: Fourth Cause of Action**

12 Because the UPA does not create an express trust, as CWT alleges, neither Carrigan nor  
13 Ker were trustees of CWT. The breach of trust count against them therefore fails to state a claim  
14 for which relief may be granted.

15 **3. Breach of Fiduciary Duty: Fifth Cause of Action**

16 Neither Carrigan nor Ker were, as a matter of fact or law, in a fiduciary relationship with  
17 CWT with respect to the UPA. The relationship was that of arms'-length contracting parties,  
18 CWT and RDX. Neither Carrigan nor Ker were "trustees" of CWT with respect to the tax credit  
19 funds. Therefore, the breach of fiduciary duty count against them fails to state a claim for which  
20 relief may be granted.

21 **4. Aiding and Abetting Breach of Fiduciary Duty and Breach of**  
22 **Trust: Sixth Cause of Action**

23 Danzik and RDX were not, as a matter of fact or law, in a fiduciary relationship with  
24 CWT with respect to the UPA, or trustees of CWT. The relationship was that of arms'-length  
25 contracting parties, CWT and RDX. The UPA does not establish an express trust with respect to  
26 the tax credit funds. Therefore, the aiding and abetting breach of fiduciary duty and breach of

1 trust counts against Carrigan and Ker, based on any purported fiduciary duty owed by Danzik  
2 and/or RDX, as trustees, to CWT with respect to the tax credit funds, therefore fail to state  
3 claims for which relief may be granted.

4 Elizabeth Danzik cross-moves for summary judgment on the following of CWT's claims  
5 against her in CWT's Complaint:

6 **5. Constructive Trust: Ninth Cause of Action**

7 A constructive trust is a remedy, not an independent cause of action. The independent  
8 constructive trust count therefore fails to state a claim for which relief may be granted.

9 **6. Accounting: Tenth Cause of Action**

10 An accounting cause of action is brought in order to determine the amount that another  
11 party allegedly owes. CWT's complaint alleges exact amounts sought. This count therefore fails  
12 to state a claim for which relief may be granted.

13 **II. Material Facts**

14 The Second Amended Complaint, Docket 56, asserts claims against Carrigan and Ker for  
15 tortious interference with the UPA (Third Cause of Action), breach of trust (Fourth Cause of  
16 Action), breach of fiduciary duty (Fifth Cause of Action), and aiding and abetting breach of  
17 fiduciary duty (Sixth Cause of Action).

18 CWT's Complaint against Elizabeth Danzik, filed March 6, 2016 in Case 2:16-cv-00607-  
19 DGC, asserts claims against her for constructive trust (Ninth Cause of Action) and accounting  
20 (Tenth Cause of Action), the latter of which alleges exact amounts sought, \$1 million and  
21 \$730,000.00. The Second Amended Complaint, against Carrigan, Ker, and DAS, also asserts  
22 claims for fraudulent transfer (Ninth, Tenth, and Eleventh Causes of Action), and that CWT  
23 engaged an accounting expert who analyzed all of the transactions regarding to the funds sought  
24 by CWT's from Elizabeth Danzik. (Second Amended Complaint, ¶ 26.)

25 Carrigan, Ker, and Elizabeth Danzik incorporate herein the Material Facts section of the  
26 Response, *supra*.

### 1           **III.    Argument**

#### 2                   **1.    No Basis for Tortious Interference Claim**

3           It is well-settled that a party to a contract cannot be liable for tortious interference with  
4 that contract. *Wells Fargo Bank v. Arizona Laborers*, 201 Ariz. 474, 38 P.3d 12 (2002), *BioD,*  
5 *LLC v. Amnio Technology, LLC*, 2015 WL 143811 (D.Ariz., 2015), *Stilwell v. City of Williams*,  
6 668 Fed.Appx. 227, 229 (D.Ariz., 2016) and *Hudson v. Craven*. 403 F.3d 691 (9<sup>th</sup> Cir.,  
7 2005)(under Washington law). Carrigan was a director and Ker was a director and officer of  
8 RDX. CWT also alleges, although Carrigan and Ker deny, that they, as agents of RDX, were  
9 also trustees of the tax credit funds by virtue of the contract's provision pertaining to the tax  
10 credit funds. Regardless of any of these labels regarding their status, it is clear that they were  
11 neither "strangers" to the UPA nor third-party beneficiaries of it, the only types of proper parties  
12 to such a claim. Because Carrigan and Ker cannot be liable to CWT for tortious interference as a  
13 matter of law, the Third Cause of Action against them must be dismissed.

#### 14                   **2.    No Basis for Breach of Trust or Aiding and Abetting Breach of Trust** 15                   **Claims**

16           CWT alleges that the UPA established an express trust (Second Amended Complaint  
17 121), and that Carrigan, Ker, Danzik, and/or RDX are the trustees. However, Section 2.3 of the  
18 UPA, concerning the payment to CWT at closing of tax credit funds, is a single-paragraph  
19 provision that makes no reference whatsoever to a trust, a trustor, a trustee, or a beneficiary. It  
20 also makes no reference to Carrigan, Ker, or Danzik, in any capacity. CWT is attempting to  
21 transform a breach of contract claim into various torts, including this claim for breach of express  
22 trust. Because there is no factual or legal basis for positing an express trust, there are no grounds  
23 for CWT's assertion of a breach of trust claim or a claim for aiding and abetting a breach of  
24 trust. Accordingly, these claims against Carrigan and Ker must be dismissed.  
25  
26

1                   **3.     No Basis for Breach of Fiduciary Duty or Aiding and Abetting Breach**  
2                   **of Fiduciary Duty Claims**

3                   The relationship between CWT and Carrigan, Ker, Danzik, and RDX can only be  
4 characterized as contractual. As a matter of fact and law, they never had a fiduciary relationship  
5 with, or fiduciary duty to, CWT. *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6,  
6 945 P.2d 317 (1996)(trust, confidence, and reliance, though necessary components, do not  
7 suffice to establish a fiduciary relationship; fiduciary relationship is distinguished from arm's  
8 length relationship, and mere trust in another's competence or integrity does not suffice to create  
9 fiduciary relationship). The relationship between the parties is nothing more than a commercial  
10 contract, and nowhere have these Defendants agreed to serve as fiduciaries for CWT, and the  
11 law does not, in these circumstances, impose such a duty. "A commercial contract creates a  
12 fiduciary relationship only when one party agrees to serve in a fiduciary capacity." *Urias v.*  
13 *PCS Health Sys., Inc.*, 211 Ariz. 81, 87, 118 P.3d 29, 35 (App. 2005). Although the relationship  
14 between joint-venturers is fiduciary in character, and imposes on all participants an obligation of  
15 loyalty to the joint concern and of utmost good faith, fairness, and honesty with their dealings  
16 with each other with respect to matters pertaining to enterprise, see *Ghiz v. Millett*, 71 Ariz. 4,  
17 222 P.2d 982 (1950), there is no evidence, and nor does CWT allege, that the UPA created a  
18 joint venture among and between the parties. Accordingly, the breach of fiduciary duty and  
19 aiding and abetting breach of fiduciary duty claims must be dismissed as a matter of law.

20                   **4.     Constructive Trust is a Remedy Not An Independent Cause of Action**

21                   CWT's claim for constructive trust is not an independent cause of action, but, rather, is a  
22 remedy. *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 410, 276 P.3d 11, 44 (2012),  
23 *Burch & Cracchiolo, P.A., v. Albino Pugliani*, 144 Ariz. 281, 285, 697 P.2d 674, 678 (1985)("A  
24 constructive trust is an equitable remedial device, generally used to prevent unjust  
25 enrichment."), and *Murphy Farrell Dev., LLP v. Sourant*, 229 Ariz. 124, 130, 272 P.3d 355,  
26 361 (Ct. App. 2012)(noting that constructive trust is an equitable remedy tied to unjust

enrichment). This count against Elizabeth Danzik therefore fails to state an independent claim upon which relief can be granted, and must be dismissed.

### 5. Accounting Claim Against Elizabeth Danzik

The accounting claim must be dismissed because the purpose of such a claim is for a party to determine the amount that another party allegedly owes. In the Second Amended Complaint, at ¶ 26, CWT alleges that they engaged a forensic accounting expert, who has traced \$1 million of the tax credit funds to Elizabeth Danzik. The Complaint against Elizabeth Danzik alleges that she must return \$1 million paid to her company regarding a stock purchase transaction, and that, according to CWT's forensic accounting analysis, \$730,000.00 of the tax credit funds are attributable to Elizabeth Danzik as her share of community property in relation to the use and payoff of one of Danzik's credit cards. CWT therefore has already quantified its claim against her. CWT's accounting claim against her alleges that CWT has no adequate remedy at law, and therefore the claim is in fact one for an equitable accounting. Nowhere has CWT alleged a partnership relationship with Elizabeth Danzik, so there is no partnership basis for seeking an accounting. *Estate of Kirschenbaum v. Kirschenbaum*, 164 Ariz. 435, 793 P.2d 1102 (1989)(a cause of action for an accounting may exist in a partnership context).

An "equitable accounting" is a distinct remedial cause of action, rooted in equity, which seeks an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due. *Mankert v. Elmatco Products, Inc.*, 84 Conn. App. 456, 854 A.2d 766 (2004); *Grgurev v. Licul*, 229 F. Supp. 3d 267 (S.D. N.Y. 2017)(applying New York law), *Green Valley Landowners Association v. City of Vallejo*, 241 Cal. App. 4th 425, 194 Cal. Rptr. 3d 19 (1st Dist. 2015), review denied, (Jan. 13, 2016), and *Datto Inc. v. Braband*, 856 F. Supp. 2d 354, 375 (D. Conn. 2012)(applying Connecticut law). It may be sought through an equitable proceeding that is properly ordered when there is an unliquidated and unascertained amount owing that cannot be determined without an examination of the debits and credits on the books to determine what is due and owing. (*Id.*) *EQT Production Company v. Magnum Hunter*

1 *Production Company*, 2017 WL 3052979 (E.D. Ky. 2017)(applying Kentucky law). An  
2 accounting is not a proceeding to which every litigant may maintain as of right and should be  
3 granted only in carefully prescribed and determined circumstances. *Heath v. Sims*, 242 Ga. App.  
4 691, 531 S.E.2d 115 (2000), and *Ralls Corp. v. Huerfano River Wind, LLC*, 27 F. Supp. 3d 1303  
5 (N.D. Ga. 2014) (applying Georgia law). An accounting has been described as a species of  
6 disclosure, predicated on a plaintiff's legal inability to determine how much money, if any, is  
7 due; the purpose of the accounting is therefore, in part, to discover what, if any, sums are owed  
8 to the plaintiff, and, in this way, an accounting may be used, in a sense, as a discovery device.  
9 *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 92 Cal. Rptr. 3d 696 (3d Dist. 2009). In many  
10 jurisdictions, the remedy of equitable accounting is available primarily in two circumstances:  
11 when a fiduciary owes an equitable duty to account or when an account is exceedingly  
12 complicated. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC*, 813  
13 N.W.2d 49 (Minn. 2012). Here, there is no fiduciary relationship alleged or that ever existed,  
14 and the CWT's claim is for a fixed sum, so there is no excessive complication in arriving at that  
15 sum, which is the primary purpose of an equitable accounting.

16 CWT has engaged a forensic accounting expert, who has analyzed the relevant data and  
17 produced a report, including in the context of CWT's fraudulent transfer claims in the Second  
18 Amended Complaint. That is, CWT has already performed its discovery and the pertinent  
19 accounting information has been disclosed. There is no basis or need for an accounting claim  
20 against Elizabeth Danzik, as all of the relief that an accounting claim could possibly have  
21 obtained has already been provided and, therefore, moot.

22 To state a *prima facie* case seeking an equitable accounting, a plaintiff generally is  
23 required to establish that:

24 (1) a fiduciary or confidential relationship exists between the plaintiff and the  
25 party from whom an equitable accounting is sought, or that the account at issue is  
exceedingly complicated;

26 (2) the plaintiff has no adequate remedy at law; and



(3) a demand for an accounting has been made.

As noted, there is no fiduciary relationship or any existing accounting complexity. Regarding the third element, to state a cause of action for equitable accounting, a claimant must sufficiently set out that she demanded an accounting and that the other party refused the demand. *Romanoff v. Romanoff*, 148 A.D.3d 614, 51 N.Y.S.3d 36 (1st Dep't 2017), *Unitel Telecard Distribution Corp. v. Nunez*, 90 A.D.3d 568, 936 N.Y.S.2d 17 (1st Dep't 2011), and *Episcopal Church in Diocese of Connecticut v. Gauss*, 302 Conn. 408, 28 A.3d 302 (2011). There is no allegation or evidence that this demand was ever made.

For all of these reasons, the accounting claim must be dismissed.

#### IV. Conclusion

For the foregoing reasons, the above-referenced claims must be dismissed. Because the claims arise out of the UPA and stock-purchase contract, these Defendants request an award of their reasonable attorneys' fees and costs incurred in defending these counts, pursuant to A.R.S. §§ 12-341 and 12-341.01, any applicable provisions of the contracts, and/or otherwise at law.

**DATED** this 22<sup>nd</sup> day of August, 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 22, 2018, the following was served on all registered parties via ECF and I emailed the attached document to the following individuals:

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